

# Partition Fencing



## ISSUE MEMORANDUM 2016-03

### Introduction

This last spring, an interim study request was proposed to evaluate the partition fencing laws in South Dakota. This issue memorandum attempts to address that request by providing information on the partition fencing law in the state. Partition fences are those fences that separate the lands of adjoining landowners. Landowners are generally liable for one-half of the expense of erecting and maintaining a partition fence.

South Dakota fence law, found in SDCL chapter 43-23, establishes the rules governing the responsibility, construction, and maintenance of partition fences. Disputes may arise between adjoining landowners regarding the responsibility to erect, maintain, and repair partition fences. These fence law provisions are intended to establish parameters and resolve disputes between adjoining landowners who are unable to reach an agreement. The responsibility for fencing is not limited to livestock owners but shared between non-livestock owners, as well. This issue memorandum provides historical background and reviews the most recent legislative actions concerning partition fencing.

### History of Legislative Actions

The vast majority of current provisions governing partition fencing were enacted in 1909. Since then, few substantive changes have been made to SDCL chapter 43-23. There were noteworthy changes in 1988, when the Legislature revised landowner liability. Prior to the passage of HB 1215, every landowner was liable for one-half of the expenses of maintaining or erecting a partition fence. After passage, adjoining landowners had discretion to determine the liability of expenses incurred. No landowner shall be held liable for the expense of erecting or maintaining a partition fence if neither landowner keeps livestock on the land, or derives any other substantial benefit from the fence for a period of five years from the date of the erection or repair of the fence.

The next statutory change occurred in 1990 and revised the costs recoverable by an aggrieved landowner. Previously, SDCL 43-23-6 provided that an aggrieved landowner could only recover twenty-five dollars in liquidated damages in a civil action, if a delinquent adjoining landowner neglected or refused to erect or repair a fence. HB 1027 removed the cap of twenty-five dollars and allowed an aggrieved landowner to recover the costs of repairs or the erection of a partition fence, in an amount determined by the court.

The last major statutory change occurred in 2001. HB 1201 created statutory requirements for a legal

buffalo fence. A legal fence for buffalo may use smooth wire instead of barbed wire. All posts must be at least fifty-four inches above ground. The owner or caretaker of the buffalo is responsible for the expense of the added fence, unless both adjoining parties keep buffalo on the land.

### Legal Fence

In certain instances, adjoining landowners may come to an agreement as to how to allocate the responsibility between themselves for the building and maintenance of a partition fence. If landowners reach agreement, the fence does not need to follow any certain specifications and is considered a legal fence, pursuant to SDCL 43-23-3. However, if the adjoining landowners cannot agree, then a legal partition fence must be constructed according to the specifications of SDCL 43-23-4. A legal fence consists of at least four strands of barbed wire spaced at eighteen, twenty-eight, thirty-eight, and forty-eight inches from the ground, respectively. The posts are to be constructed and spaced as follows:

- Wood posts that are at least six and a half feet long and four inches in diameter, with the posts firmly set at least two feet in the earth and not over thirty feet apart;
- Concrete posts six feet or more in length having a diameter of no less than four inches and having a quarter inch wide rod through the

entire post, and the posts not over thirty feet apart; or

- Steel posts not less than five and one-half feet in length, with the posts firmly set at least seventeen inches in the ground and not over twenty feet apart.

Each post must be firmly braced at ends, corners and gateways or openings.

The specifications for a legal fence have not been changed since 1973.

### **Responsibility and Neglect**

Although South Dakota law provides that responsibility is divided evenly between adjoining landowners, disputes often occur. South Dakota law is specific as to the part of the fence for which each landowner is responsible. Unless otherwise agreed upon, adjoining landowners are liable for one-half of the expense of erecting and maintaining a partition fence. In these cases, the right-hand rule is applied, pursuant to SDCL 43-23-2, "each owner of adjoining lands shall build that half of the fence which shall be upon his right hand when he stands upon his own land and faces the line upon which the proposed fence is to be built." Essentially, the adjoining landowners meet at the center point of the fence and agree to maintain the portion of the fence to their right, respectively.

Another common issue is neglect of fence repair duties. As stated above, South Dakota law requires that the owners of adjoining lands build and maintain in good repair all partition fences in equal shares. This sometimes creates a dispute when a livestock owner shares a partition fence with a crop farmer or landowner who does not graze livestock.

Another dispute may arise from a landowner who has buffalo. Buffalo require specialized fencing, which requires additional costs. Unlike the legal fence specifications of SDCL 43-23-4, buffalo require a taller fence and many producers use smooth wire instead of barbed wire. Even if a landowner does not have livestock, the landowner may still be held liable for the maintenance and erection of a partition fence.

### **Resolving Disputes and Recovering Cost**

The Legislature has provided a legal framework if a fence dispute arises. If a landowner fails to erect or repair a partition fence the owner of the adjoining land may serve the delinquent landowner a notice in writing, demanding a fence to be repaired or erected within thirty days of the service of the notice. The adjoining landowner has further recourse if the delinquent landowner after receiving the written notice and within the specified time period takes no action. The adjoining landowner may recover the costs of erecting or repairing the fence in a civil action, or place a lien on the delinquent landowner. This lien would be regarded as superior to all other liens except taxes. The adjoining landowner is also entitled to recover an amount for time spent erecting or repairing the fence, determined by the court. However, the delinquent landowner is not required to build a partition fence if the ground is frozen.

South Dakota law also specifies that damage to a fence or a gate is classified as a Class 2 misdemeanor. A person may also be guilty of a Class 2 misdemeanor if the person intentionally opens, or leaves open a gate in a fence. The maximum penalty under state law upon conviction of a Class 2 misdemeanor is thirty days imprisonment in a county jail, a five hundred dollar fine, or both. Since 2012, there have been three charges filed and two convictions, pursuant to SDCL 43-23-10.

### **Conclusion**

In its long history, South Dakota partition fence law has seen remarkably few changes compared to other sections of law. For non-livestock owners, the costs of a fence may outweigh the benefits of the fence to the landowner. For livestock owners, fences are required to keep livestock out of adjoining property. Consequently, adjoining landowners bear some responsibility, even if they have no livestock, for the benefit of fencing out livestock.

Nonetheless, South Dakota law is intended for the benefit of both livestock and non-livestock landowners. The law offers some flexibility and discretion to landowners in the erection and maintenance of partition fences. Adjoining landowners may agree not to have fences or may agree upon a fencing arrangement different from



what is specified statutorily. The best outcome is when adjoining landowners come together in agreement as neighbors. As the old adage goes, "Good fences make good neighbors."

This issue memorandum was written by Amanda Jacobs, Research Analyst on 11/16/2016 for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.

